

FILED BY CLERK

JAN 14 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0249-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MITCHELL NELSON,)	Rule 111, Rules of
Petitioner.)	the Supreme Court
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20051104

Honorable Charles S. Sabalos, Judge

REVIEW GRANTED; RELIEF DENIED

The Hopkins Law Office P.C.
By Cedric Martin Hopkins

Tucson
Attorney for Petitioner

B R A M M E R, Judge.

¶1 In 2006, Mitchell Nelson was convicted after a jury trial of aggravated assault and negligent child abuse. The trial court sentenced him to a presumptive, enhanced 7.5-year prison term for aggravated assault and a concurrent, presumptive, one-year prison term for negligent child abuse. We affirmed his convictions and sentences on

appeal. *State v. Nelson*, No. 2 CA-CR 2006-0205 (memorandum decision filed Jul. 3, 2008). Nelson filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., arguing his trial counsel had been ineffective in failing to “object to the adequacy of the court’s findings” regarding the sufficiency of evidence of prior acts admitted during trial. The trial court summarily dismissed Nelson’s petition, concluding he had “fail[ed] to present a material issue of fact or law which would entitle [him] to relief.” This petition for review followed.

¶2 Although Nelson argued in his petition for post-conviction relief that his trial counsel had been ineffective, he does not raise that argument in his petition for review. Accordingly, we do not address that issue. *See* Ariz. R. Crim. P. 32.9(c)(1) (“Failure to raise any issue that could be raised in the petition . . . for review shall constitute waiver of appellate review of that issue.”). Nelson instead asserts he was “prejudice[d]” because the trial court erred by permitting the jury to hear evidence about prior acts before “ruling whether [that evidence] was admissible.” *See State v. Terazzas*, 189 Ariz. 580, 584, 944 P.2d 1194, 1198 (1997) (“[B]efore admitting evidence of prior . . . acts, trial judges must find that there is clear and convincing proof both as to the commission of the other . . . act and that the defendant committed the act.”). Nelson only raised this issue below as part of his argument that his trial counsel had been ineffective, not as a separate claim for relief. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review limited to “issues which were decided by the trial court”); *see also State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (issues may not be raised properly for first

time in petition for review). Assuming, without deciding, that Nelson has preserved the issue sufficiently for our review, we already have rejected this argument in Nelson’s direct appeal. Accordingly, he is precluded from raising it in this subsequent Rule 32 proceeding. *See* Ariz. R. Crim. P. 32.2(a)(1)-(2) (defendant precluded from raising in Rule 32 petition any ground “[r]aisable on direct appeal” or “[f]inally adjudicated on the merits on appeal”).

¶3 For the reasons stated, we grant review of Nelson’s petition but deny relief.

J. WILLIAM BRAMMER, JR, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge